92-1465

No. 92-_____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1992

PAUL CASPARI, Superintendent,
Missouri Eastern Correctional Center,
and
JEREMIAH W. (JAY) NIXON,
Attorney General of Missouri,

*Petitioners,*

vs.

TERRY D. McINTYRE,

*Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI (Volume I)

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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| **PAUL CASPARI, Superintendent, Missouri Eastern Correctional Center, and JEREMIAH W. NIXON, Attorney General of Missouri,** | ) | |
| **Petitioners,** | ) | |
| **vs.** | ) | No. 92-_____ |
| **TERRY D. McINTYRE,** | ) | |
| **Respondent.** | ) | |

**INDEX TO PETITIONERS' APPENDIX**


| | Pages |
|---|---|
| 1. Opinion of the United States Court of Appeals for the Eighth Circuit, filed September 4, 1992, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700. | A-1 |
| 2. Opinion of the United States Court of Appeals for the Eighth Circuit, filed July 15, 1991, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700. | A-29 |
| 3. "Report and Recommendation" of Magistrate David D. Noce, filed November 2, 1988, in **Terry D. McIntyre v. Myrna Trickey and William L. Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.) | A-65 |

4. Order of United States District Court for the Eastern District of Missouri sustaining and adopting the Magistrate's Report and Recommendation, filed November 22, 1988, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.), filed November 22, 1988. A-72

5. Order of Magistrate Noce, filed April 24, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C. E.D.E.D.). A-74

6. "Report and Recommendation of United States Magistrate," filed August 7, 1989, in **Terry D. McIntyre v. Myrna Trickey and William L. Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.). A-80

7. Order of District Court sustaining and adopting the Magistrate's Report and Recommendation, filed September 18, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C. E.D.E.D.). A-101

8. Memorandum and Order denying certificate of probable cause, filed October 17, 1989, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No 88-1708C(2) (U.S.D.C.E.D.E.D.). A-103

9. Order granting certificate of probable cause, filed May 7, 1990, in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700EM (U.S. Ct. App. 8th Cir.). A-106

10. Opinion of the Missouri Court of Appeals, Eastern District, filed June 30, 1987, in **State of Missouri v. Terry D. McIntyre**, No. 51914. A-108

11. Opinion of the Missouri Court of Appeals, Eastern District, filed February 16, 1988, in **State of Missouri v. Terry D. McIntyre**, No. 53084. A-115

12. Order of the United States Court of Appeals for the Eighth Circuit denying re-hearing or rehearing en banc in **Terry D. McIntyre v. Myrna Trickey**, No. 89-2700EMSL, filed December 10, 1992. A-126

13. Petition for habeas corpus relief filed on September 2, 1988. A-127

14. "Motion to Alter or Amend Judgment," served on November 30, 1988, in **Terry D. McIntyre v. Myrna Trickey and William Webster, Attorney General, State of Missouri**, No. 88-1708C(2) (U.S.D.C.E.D.E.D.). A-137

**UNITED STATES COURT OF APPEALS**
FOR THE EIGHTH CIRCUIT

No. 89-2700

| | | |
|---|---|---|
| Terry D. McIntyre, | ) | |
| | ) | |
| Appellant, | ) | Remand from the |
| | ) | United States |
| v. | ) | Supreme Court. |
| | ) | |
| Myrna Trickey, | ) | |
| | ) | |
| Appellee. | ) | |

Submitted: May 27, 1992

Filed: September 4, 1992

Before MCMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

This case is before us on remand from the United States Supreme Court. In McIntyre v. Trickey, 938 F.2d 899 (8th Cir. 1991), we held that a state attorney's prosecution of Terry D. McIntyre for stealing an automobile violated the Fifth Amendment's Double Jeopardy Clause because McIntyre had earlier been

prosecuted for first-degree tampering based on his unauthorized operation of the same automobile. Id. at 905-07. Our decision applied the rule of Grady v. Corbin, 495 U.S. 508 (1990), which states that the Double Jeopardy Clause blocks a subsequent prosecution if the government, to establish an essential element of the charge to be prosecuted, will prove conduct constituting an offense for which the defendant has already been prosecuted. Id. at 521. In United States v. Felix, 112 S. Ct. 1377 (1992), the Supreme Court recently announced limitations on the Grady rule. The Court vacated our opinion in McIntyre, and remanded for reconsideration in light of Felix. Caspari v. McIntyre, 112 S. Ct. 1658 (1992). Relying on Grady, as modified by Felix, we again hold that the second prosecution of McIntyre violated the Double Jeopardy Clause.

In June 1986, a circuit court in the City of St. Louis found McIntyre guilty of first-degree tampering, based on his operation of an automobile owned by a Kirkwood, Missouri, car dealership with the knowledge that he lacked the owner's consent. In February 1987, a circuit court in the County of St. Louis convicted McIntyre of stealing that same automobile from the dealership.

The Missouri Court of Appeals rejected McIntyre's double jeopardy claim. State v. McIntyre, 749 S.W.2d 420, 422 (Mo. Ct. App. 1988). McIntyre filed a petition for a writ of habeas corpus in the district court based on his double jeopardy claim.[1] A magistrate judge

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[1]Nothing appears in the record regarding McIntyre's efforts to exhaust his state remedies. The State of Missouri, in its response to McIntyre's

recommended denying McIntyre's petition because under Missouri law, tampering is not a lesser-included offense of stealing. McIntyre v. Trickey, No. 88-1708C(2), slip op. at 3-4 (E.D. Mo. Nov. 2, 1988) (magistrate's report). The district court adopted the magistrate's report and recommendation. Order of Nov. 22, 1988, slip op. at 1. After McIntyre refined and reasserted his claim in a motion to alter or amendment [sic] judgment, the magistrate again recommended denying relief, Magistrate's Report of August 8, 1989, slip op. at 12, and the district court adopted that recommendation. Order of September 18, 1989, slip op. at 1.

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(Footnote Continued)
federal habeas petition, stated that McIntyre had exhausted all state remedies on his double jeopardy claim and his petition was not procedurally barred. 938 F.2d at 900-01.

After proceedings in the district court, the Supreme Court issued its opinion in Grady v. Corbin, and McIntyre asserted a Grady claim before this court. This court rejected the State of Missouri's arguments that we should not reach the merits because McIntyre had failed to exhaust state remedies and had committed "abuse of the writ." McIntyre, 938 F.2d at 901-02. We also held that McIntyre was entitled to rely on Grady although that case prescribed a "new rule" under Teague v. Lane, 489 U.S. 288 (1989). McIntyre, 938 F.2d at 902-04. We concluded that the Grady rule fit into one of the two Teague exceptions that allow retroactive application of new rules for cases on collateral review. Id.

We concluded under Grady that the second prosecution of McIntyre violated the Double Jeopardy Clause because "the

government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted." Id. at 906. We observed that in the second trial, for stealing, the "government proved the same conduct that it had proved to establish the entirety of the tampering offense." Id. (emphasis added). We then observed that the conduct that proved the tampering offense was used to prove "the whole of . . . two elements" of the stealing charge. Id.

After the Supreme Court vacated our decision with directions to reconsider in light of Felix, the parties submitted letter briefs at our request.

The State of Missouri again argues that McIntyre should be prohibited from proceeding on the merits because he failed to exhaust his double jeopardy

claim in the state courts. The State also repeats its argument that McIntyre cannot rely on Grady because that case announced a "new rule" after his conviction became final.

We are not persuaded by the State's arguments and adhere to our earlier holdings on these issues.[2] See 938 F.2d at 901-04.

The State next contends that Felix requires denial of McIntyre's petition for a writ of habeas corpus.

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[2]We are aware of the Second Circuit's decision in United States v. Salerno, 964 F.2d 172 (2d Cir. 1992), disagreeing with our conclusion that the Grady rule is retroactively available to habeas petitioners because it falls within one of the two Teague exceptions. Id. at 176-79. We adhere to our holding that Grady must be accorded retroactive effect because the prohibition on double jeopardy is a "'categorical guarantee[] accorded by the Constitution.'" McIntyre, 938 F.2d at 904 (citation omitted).

Specifically, the State asserts that: (1) McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing; (2) a mere overlap in proof between the two prosecutions does not establish a double jeopardy violation; and (3) the conduct constituting the two offenses, stealing and tampering, occurred on different days and the Double Jeopardy Clause thus does not bar separate prosecutions.

The resolution of this case turns on the extent to which Felix modifies the rule of Grady. The Grady test is relatively simple in its formulation: The Double Jeopardy Clause bars a "subsequent prosecution [if] . . . the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 495 U.S. at 521. In

Felix, however, the Supreme Court refused to apply this language to bar a prosecution for conspiracy to manufacture, possess, and distribute methamphetamine when two of the nine overt acts supporting the conspiracy charge were based on conduct for which Felix had previously been prosecuted. 112 S. Ct. at 1380, 1385. The Court also held that prosecution on related substantive counts was not barred even though evidence concerning the underlying conduct had been introduced in a previous drug trial to establish Felix's criminal intent. Id. at 1380, 1382-83.

In its discussion, the Court distinguished between prosecution for an offense and the introduction of relevant evidence of particular misconduct. Id. at 1383. It also distinguished between crimes involving a "'single course of conduct'" and those involving

"'multilayered conduct as to time and place.'" Id. at 1385.

Felix thus limited, but did not discard Grady. Our task is to determine whether the nature of McIntyre's criminal conduct and the scope of the two prosecutions still bring his case within the Grady rule or cast it into one of the categories covered by Felix.

In Grady, the Court held that the Double Jeopardy Clause barred the prosecution of a motorist for criminally negligent homicide and assault after he had earlier pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same accident. 495 U.S. at 521-23. The Court observed that the State of New York admitted that it planned to prove "the entirety of the conduct for which Corbin was convicted--driving while intoxicated and failing to keep right of

the median--to establish essential elements of the homicide and assault offenses." Id. at 523. The Court stated, however, that the State could proceed with the prosecution if it relied on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. It also limited its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. at 521-22. "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id. at 521.

Felix presented a far different factual pattern than that of Grady. The government first prosecuted Felix in the Western District of Missouri for the attempt to manufacture methamphetamine

between August 26 and 31, 1987, based on the delivery of precursor chemicals and equipment to him at Joplin, Missouri. 112 S. Ct. at 1379. To counter Felix's defense that he lacked criminal intent with respect to the delivery, the government introduced evidence that he had manufactured methamphetamine in Oklahoma earlier in 1987. Id. at 1380. The government introduced the evidence under Federal Rule of Evidence 404(b), and the district court instructed the jury that the evidence of the Oklahoma activities was admissible only to show Felix's state of mind regarding the chemicals and equipment he attempted to purchase in Missouri. Id.

The government later prosecuted Felix in the Eastern District of Oklahoma for conspiracy to manufacture, possess, and distribute methamphetamine between May 1, and August 31, 1987. Two of the

nine overt acts supporting the conspiracy charge were based on conduct that had been the subject of the Missouri prosecution. Id. The government also prosecuted Felix on related substantive charges. Id. at 1380-81.

The Court first rejected the argument that the Double Jeopardy Clause barred Felix's prosecution on the substantive drug offenses even though the government had presented evidence of those offenses at the earlier Missouri trial. "Felix was charged in the Missouri case only with attempting to manufacture methamphetamine in Missouri, in late August 1987" while in the Oklahoma case, he "was charged with various drug offenses that took place in Oklahoma in June and July 1987." Id. at 1382. The Court explained: "The actual crimes charged in each case were different in both time and place; there was absolutely no common

conduct linking the alleged offenses." Id.

The Court further stated that although evidence of the Oklahoma transactions was admitted at the Missouri trial, it was introduced simply to "help show Felix' state of mind" and that "he was not prosecuted in the Missouri trial for any offense other than the Missouri attempt offense. . . ." Id. (emphasis in original). Citing Dowling v. United States, 493 U.S. 342 (1990), the Court observed: "[T]he introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383.

The Court next rejected the argument that the prosecution of Felix on the Oklahoma conspiracy charge violated double jeopardy because two of the nine overt acts supporting the conspiracy charge concerned conduct for which Felix

had been previously prosecuted in Missouri. Id. at 1383-85. The Court refused to apply Grady in this context: "Taken out of context, and read literally, this language [in Grady] supports the defense of double jeopardy. But we decline to read the language so expansively, because of the context in which Grady arose and because of difficulties which have already arisen in its interpretation." Id. at 1383-84.

The Court rejected the double jeopardy claim because of "long established precedent," id. at 1383, holding that conspiracy to commit an offense and the offense itself "are separate offenses for double jeopardy purposes." Id. at 1385. The Court then addressed the basis of Grady's holding, stating that although the traffic offenses in that case "were not technically lesser-included offenses of the homicide and assault charges,"

they were analogous to charges discussed in Illinois v. Vitale, 447 U.S. 410 (1980), which the Court had labeled a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. In Vitale, the Court stated in dicta that a traffic conviction for failure to reduce speed might be viewed as a "'species of lesser included offense'" if the State relied on the conduct underlying that conviction to prosecute the motorist on a manslaughter charge arising from the same accident. Id. at 1384 (citing Vitale, 447 U.S. at 420). In Grady, the Court "simply adopted the suggestion [it] had previously made in dicta in Vitale." 112 S. Ct. at 1384.

The Court then distinguished between cases involving a "'single course of conduct'" and those involving "multi-layered conduct as to time and place." Id. at 1385. Although reliance on a

lesser-included offense analysis may be useful in the former situation, it is "much less helpful in analyzing" the latter. Id. (citing Garrett v. United States, 471 U.S. 773 (1985)[)].

Felix therefore suggests that the Grady rule applies in cases where the criminal activity was limited to a "single course of conduct" rather than to cases involving certain types of "multi-layered conduct." See United States v. McHan, 966 F. 2d 134, 140-41 (1992) (as amended). If a single course of conduct is involved, we must then determine whether one of the charged offenses is a "species of lesser included offense" of a greater offense charged in a separate prosecution. See Sharpton v. Turner, 964 F.2d 1284, 1288 (2d Cir. 1992).

We first consider the threshold issue of the nature of the conduct involved. The evidence admitted in his two

trials showed that on November 22, 1985, McIntyre entered a car dealership in Kirkwood, Missouri, and arranged to go on a test drive with a salesman, Steven George. While George was getting the keys to the demonstrator car, McIntyre remained in the showroom looking at another car that had keys in its ignition that were similar to the keys of the demonstrator car. After McIntyre took the test drive with George, he gave a set of keys to the salesman. About fifteen minutes after McIntyre left the dealership, George and another salesman discovered that the demonstrator's keys were missing and that the keys returned by McIntyre were the keys to the showroom model.

Two days later, on November 24, two police officers spotted McIntyre driving the stolen car. After a pursuit, the officers stopped the car and arrested

McIntyre and a passenger. The officers discovered the missing keys in the car's ignition.

A circuit court jury in the City of St. Louis found McIntyre guilty of first-degree tampering, Mo. Rev. Stat. § 569.080 (1986), based on his unauthorized operation of the car on November 24 with the knowledge that he lacked the owner's consent. A circuit court jury in the County of St. Louis later found McIntyre guilty of felony stealing, Mo. Rev. Stat. § 570.030 (1986), based on his taking the same car without the owner's consent for the purpose of withholding it permanently from the owner.

The criminal activity at issue here--stealing a car and then driving it--is not the type of "multilayered conduct as to time and place" that the Court exempted from the Grady rule in Felix. See 112 S. Ct. at 1385. Clear

support for this conclusion appears in Felix, where the Court distinguished multilayered conduct from the "'classically simple situation presented in Brown [v. Ohio].'" Id. (citing Garrett, 471 U.S. at 789).

In Brown v. Ohio, 432 U.S. 161 (1977), the Court applied the double jeopardy rule of Blockburger v. United States, 284 U.S. 299, 304 (1932), to bar a subsequent prosecution for auto theft after the defendant had earlier been convicted of joyriding in connection with the same automobile. Brown, 432 U.S. at 168-70. Like McIntyre, the Brown defendant stole a car and drove it for several days. Id. at 162.[3]

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[3]Brown does not control this case because under Missouri law, tampering is not a lesser included offense of stealing. State v. Rivers, 663 S.W.2d

We conclude that McIntyre's criminal activity was as "classically simple" as that of the Brown defendant, and involved a "single course of conduct" rather than "multilayered conduct." See United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990), cert. denied, 111 S. Ct. 2009-11 (1991). This determination does not settle the question, however, as to whether Grady renders unconstitutional McIntyre's second prosecution. We must also consider whether the two offenses of which McIntyre was convicted, first-degree tampering and stealing, are of such a character that one may be considered a "species of lesser included offense" under Felix.

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(Footnote Continued)
255, 256 (Mo. Ct. App. 1983). In Brown, joyriding was a lesser included offense of auto theft under Ohio law. Brown, 432 U.S. at 168.

In the tampering case, the court stated in its charge to the jury that McIntyre could not be found guilty unless jury members found that he knowingly operated the car in question, that he lacked the owner's consent to do so, and that he had knowledge of that lack of consent. In the stealing trial, the jury charge stated that McIntyre could not be found guilty unless jury members found that he took the automobile in question, that he did so without the consent of the owner, and that he did so for the purpose of withholding it permanently from the owner. (938 F.2d at 906).

Neither one of these offenses is a lesser-included offense of the other under the Blockburger standard, for each requires proof of an element that the other does not. See Blockburger, 284 U.S. at 304. Felix teaches, however, that even if one offense is "technically"

not a lesser-included offense, it still may be considered a "'species of lesser included offense.'" Felix, 112 S. Ct. at 1384. Although the Court in Felix did not define that phrase, its discussion indicated that a "species of lesser included offense" would include an "offense that is a permissible but not necessary predicate[]" of a greater offense. Sharpton, 964 F.2d at 1288. This type of lesser offense was at issue in Grady, where "the State sought to rely on the two previous traffic offense convictions to sustain the homicide and assault charges . . . ." Felix, 112 S. Ct. at 1384.

We conclude that on the facts of this case, the first-degree tampering charge must be viewed as a species of lesser-included offense of the greater offense of stealing under the Felix analysis. As in Grady, the government relied on conduct for which McIntyre had already

been convicted to sustain the later charge. See McIntyre, 938 F.2d at 906. Although it is not necessary to rely on a thief's unauthorized operation of a car to prove that he stole the car, in this case the government relied on that conduct (which constituted the entirety of the tampering case) to prove that McIntyre stole the car. Thus, the tampering conviction was a "species of lesser included offense."

The final issue raised by Felix is whether the government actually prosecuted McIntyre in his first trial for the activities that were later used to prove the stealing charge. See Felix, 112 S. Ct. 1382-83. In Felix, the Court made clear that the "introduction of relevant evidence of particular misconduct in a case is not the same thing as prosecution for that conduct." Id. at 1383. The Court then concluded that the

introduction of the Oklahoma transactions to prove intent at the Missouri trial did not constitute "prosecution" for the Oklahoma transactions. Id. The government "simply introduced those transactions as prior acts evidence under Rule 404(b)." Id.

A far different situation is presented here. The government, to establish essential elements of the stealing charge, proved conduct--operating an automobile without the owner's consent--for which McIntyre had actually been prosecuted. See McIntyre, 938 F.2d at 906. Unlike Felix, the government here did not introduce conduct pertaining to a separate crime at the first trial simply to help prove an element of the crime charged; rather, the conduct the government proved constituted the entirety of the crime prosecuted at the first trial. Moreover, the same conduct was proved to

establish nearly the entirety of the offense charged in the second prosecution. See id.

Having analyzed the concerns raised by Felix, we again hold that the prosecution of McIntyre for stealing violated the Fifth Amendment's prohibition against double jeopardy. We are not persuaded by the government's argument that McIntyre was prosecuted at the first trial only for tampering and at the second trial only for stealing. In the stealing trial, the government proved the same conduct it had proved to establish the entirety of the tampering offense; significantly, it proved that conduct to establish nearly the entirety of the stealing charge. McIntyre, 938 F.2d at 906. This was not a situation involving a "mere overlap" in proof. See Felix, 112 S. Ct. at 1382 ("a mere overlap in proof between two prosecutions does not establish a

double jeopardy violation"). The same conduct was proved at both trials to establish charges that were nearly identical.

We also are not persuaded by the State's argument that the tampering offense and the stealing offense occurred on different days. As we stated in our first opinion, "'The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.'" 938 F.2d at 906 (citing Brown, 432 U.S. at 169).

For the foregoing reasons, we reverse the judgment of the district court and remand with instructions to grant the writ of habeas corpus.

**UNITED STATES COURT OF APPEALS**

**FOR THE EIGHTH CIRCUIT**

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No. 89-2700

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| Terry D. McIntyre, | * | |
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| Appellant, | * | Appeal from the |
| | * | United States |
| v. | * | District Court for |
| | * | the Eastern |
| Myrna Trickey, | * | District of |
| | * | Missouri. |
| Appellee. | * | |

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Submitted: January 11, 1991

Filed: July 15, 1991

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Before MCMILLIAN, JOHN R. GIBSON, and BOWMAN, Circuit Judges.

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JOHN R. GIBSON, Circuit Judge.

Terry B. McIntyre appeals from the district court's denial of his petition for writ of habeas corpus based on a claim of double jeopardy. McIntyre argues that the government, to establish essential elements in his prosecution for stealing, proved conduct that constituted

an offense, first degree tampering, for which he had earlier been convicted, thus violating the double jeopardy rule announced in Grady v. Corbin, 110 S. Ct. 2084 (1990). The State argues that: 1) McIntyre is procedurally barred from asserting his double jeopardy claim; and that 2) McIntyre cannot assert a Grady claim, as Grady announced a "new rule" that is not retroactively available to federal habeas petitioners. Moreover, the State argues that even if Grady applies, McIntyre cannot prevail under the rule of that case. The magistrate, whose report and recommendation the district court adopted, did not analyze McIntyre's double jeopardy claim under Grady, as Grady had not yet been decided. We reverse the district court's order.

In June 1986, a jury in the circuit court of the City of St. Louis found McIntyre guilty of first degree tampering

under Mo. Rev. Stat. §569.080 (1986), based on his operation on November 24, 1985, of an automobile knowing that he lacked the owner's consent. The Missouri Court of Appeals affirmed the conviction. State v. McIntyre, 735 S.W.2d 111 (Mo. Ct. App. 1987).

In February 1987, a jury in the circuit court in the County of St. Louis found McIntyre guilty of felony stealing under Mo. Rev. Stat. § 570.030 (1986), based on his stealing of that same automobile from a car dealership on November 22, 1985. The Missouri Court of Appeals, rejecting McIntyre's double jeopardy claim, affirmed the conviction. State v. McIntyre, 749 S.W.2d 420 (Mo. Ct. App. 1988). On each conviction, McIntyre was sentenced as a persistent offender to ten years imprisonment, with the second sentence to run consecutively to the first.

The evidence presented at both trials established that on November 22, 1985, a man who identified himself only as "Johnny" entered the Mitsubishi dealership in Kirkwood, Missouri, and told salesman Steven George that he wanted to test drive a Mitsubishi Galant. While George was getting the keys to a Galant demonstrator, "Johnny" remained in the showroom where he was looking at the interior of another Galant. The showroom car had keys in its ignition, and those keys were similar to the keys of the demonstrator Galant. After "Johnny" took a test drive with George, he gave a set of Galant keys to George, who returned them to the dealership's "key board." About 15 minutes after "Johnny" left the dealership, George and another salesman discovered that the demonstrator Galant was missing and that the keys which George had placed on the board were from

the showroom Galant at which "Johnny" had been looking. "Johnny" was the only person who had taken a ride with George in the demonstrator Galant on that day.

On November 24, 1985, two Kirkwood police officers spotted McIntyre driving the demonstrator Galant, which had been listed on a "hot sheet" of stolen cars. After a pursuit, the officers stopped the car and arrested McIntyre, who was driving, and a passenger. When the car was stopped, the missing Galant keys were in the ignition.

In a photographic line-up on November 27, George identified McIntyre as "Johnny." George testified at both of McIntyre's trials, as did Jake Naughton, general manager of the Mitsubishi dealership. Officer Kenneth Hornak, one of the two arresting officers, testified at the tampering trial, while the other officer,

Lawrence O'Toole, testified at both trials.

McIntyre first raised his double jeopardy claim prior to his trial on the stealing charge, and he unsuccessfully reasserted this claim on appeal. McIntyre, 749 S.W.2d at 422.

Nothing appears in the record regarding McIntyre's post-conviction proceedings in Missouri state courts. The State admitted in its response to McIntyre's federal habeas petition that McIntyre had exhausted all state remedies on his double jeopardy claim and was not procedurally barred. See Response to Order to Show Cause at 3. In a November 1988 report and recommendation, the magistrate stated that the State had conceded exhaustion. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 2 (magistrate's report) (E.D. Mo. Nov. 2, 1988).

McIntyre has restricted his federal habeas litigation to his double jeopardy claim. In his original federal petition, filed pro se, McIntyre did not cite Grady (as that case had not yet been decided), but he did clearly and thoroughly assert a double jeopardy claim.

In his November 1988 report, the magistrate recommended denying McIntyre's petition because under Missouri law, tampering is not a lesser included offense of stealing the same vehicle. Slip op. at 3-4 (magistrate's report) (November 2, 1988). The district court adopted the magistrate's report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Nov. 22, 1988). After McIntyre refined and reasserted his claim in a motion to alter or amend judgment, the magistrate issued a second report, again recommending denial of McIntyre's petition. The magistrate

reconsidered McIntyre's claim under the "same evidence test"[1] and concluded that despite the use of the same evidence at both trials, the evidence submitted at the tampering trial was not legally sufficient to convict McIntyre of stealing. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 12 (magistrate's report) (E.D. Mo. Aug. 8, 1989). The district court adopted the magistrate's second report and recommendation. McIntyre v. Trickey, No. 88-1708 C (2), slip op. at 1 (E.D. Mo. Sept. 18, 1989).

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[1]Prior to Grady, several circuits had developed a "same evidence" test that looked at whether "the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978); See also Grady, 110 S. Ct. at 2094 n.14; United States v. Ragins, 840 F.2d 1184, 1188 (4th Cir. 1988).

Through appointed counsel, McIntyre now presents this double jeopardy claim to this court.

I.

While McIntyre contends that he is entitled to relief under Grady, the State asserts that we must not reach the merits of the Grady claim because: 1) McIntyre asserted a new type of double jeopardy claim in his motion to alter or amend before the district court that was not presented in his original federal habeas petition; 2) the rule of Teague v. Lane, 489 U.S. 288 (1989), bars the application of Grady because McIntyre's conviction was final before Grady was announced.

The State's first argument can be summarized as follows: In his original habeas petition, McIntyre argued that his double jeopardy claim should be analyzed under the "same offense" test applied in Brown v. Ohio, 432 U.S. 161 (1977).

Because McIntyre in his motion to alter or amend urged the court to instead apply the "same evidence" test, he presented a claim different from the one he originally asserted. The State contends that McIntyre's failure to assert the "same evidence" test in his initial federal habeas petition constituted "abuse of the writ" under 28 U.S.C. § 2254, Rule 9(b) (1988), and also resulted in procedural default because McIntyre failed to exhaust the "same evidence" theory in the state courts.

The magistrate's second report, which the district court also adopted, rejected the State's arguments regarding abuse of the writ and procedural default. The magistrate concluded that the court should address the merits of McIntyre's claim because his motion did not present a new claim, but merely "clarif[ied]" the

existing one. Slip op. at 4 (magistrate's report) (Aug. 8, 1989).

The State's argument rests solely on its contention that McIntyre raised a new theory in his motion to alter or amend judgment that he had not presented in his original federal habeas petition. In its response to McIntyre's original federal petition, the State had conceded that McIntyre had exhausted his double jeopardy claim before the state courts and was not procedurally barred from raising the claim presented in that initial petition.

An examination of the pleadings that McIntyre submitted in connection with his initial petition and with his motion to alter or amend judgment establishes that, contrary to the State's argument, the substance of his claim remained essentially the same. In both the original petition and the motion to alter or amend, McIntyre argued that the

government used the same evidence to convict him at both trials, thus violating the Fifth Amendment's double jeopardy clause. Although McIntyre conceded in his motion to alter or amend that Brown v. Ohio, which he had relied on in his original petition, was not persuasive authority for his argument, he otherwise relied on the same authority and asserted the same basic argument.

As McIntyre presented essentially the same claim in his motion to alter or amend judgment as he presented in the original habeas petition, we conclude that the State's arguments regarding abuse of the writ and procedural bar are without merit.[2] We therefore affirm the

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[2]The State cites two cases, Buckley v. Lockhart, 892 F.2d 715, 719 (8th Cir. 1989), cert. denied, 110 S.Ct. 3243 (1990), and Gilmore v. Armontrout, 861

district court's order adopting the magistrate's report and recommendation on this issue.

II.

The State next argues that Teague v. Lane, which held that federal habeas petitioners may not attack their conviction by relying on a rule of law established after their conviction became final, 489 U.S. at 310, prevents McIntyre from relying on Grady.[3] McIntyre counters that Grady did not announce a "new rule" under Teague, but merely built upon

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(Footnote Continued)
F.2d 1061, 1064-65 (8th Cir. 1988), cert. denied, 490 U.S. 1114 (1989), to support its arguemnt that McIntyre is procedurally barred on his same evidence theory. These cases are clearly distinguishable from the one before us, as the essence of McIntyre's claim remained the same.

[3]Direct review of McIntyre's second conviction was complete in May 1988. The Supreme Court announced Grady in May 1990.

the Court's previous double jeopardy decisions, including Illinois v. Vitale, 447 U.S. 410 (1980).

Under Teague, "a case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (emphasis in original). See also Saffle v. Parks, 110 S. Ct. 1257, 1260 (1990) (test is whether a state court considering petitioner's claim at the time the conviction became final "would have felt compelled by existing precedent to conclude that the rule [petitioner sought] was required by the Constitution").

Grady held that "a subsequent prosecution must do more than merely survive the Blockburger test." 110 S. Ct. at 2093. See Blockburger v. United States, 284 U.S. 299, 304 (1932). (double jeopardy clause is not violated if each statute

requires proof of a fact which the other does not). Even if the Blockburger "same offense" test is satisfied, the double jeopardy clause still bars the "subsequent prosecution [if] the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093.

An examination of Grady establishes that this rule was not dictated by precedent existing at the time McIntyre's conviction became final, and thus, was a new rule. In fact, the Grady Court explicitly stated that it was "adopt[ing] the suggestion set forth in Vitale." 110 S. Ct. at 2087 (emphasis added). See also id. at 2093 ("As we suggested in Vitale. . . .") (emphasis added).

Justice Scalia's dissenting opinion in Grady, joined by Justices Rehnquist

and Kennedy, leaves no doubt that the dissent also regarded the Grady test as a new rule. The dissent attacked the majority for "departing from clear text and clear precedent with no justification except the citation of dictum in a recent case (dictum that was similarly unsupported and inconclusive to boot)." 110 S. Ct. at 2096 (Scalia, J., dissenting).

An examination of Vitale, relied on by the Grady majority, confirms that Grady indeed announced a new rule. While Vitale merely urged an expanded approach to double jeopardy analysis, see Vitale, 447 U.S. at 420, Grady explicitly prescribed a new test to be applied in cases involving subsequent prosecutions that do not violate the Blockburger rule. As the Grady rule was not "dictated" by precedent, we conclude that it is therefore a "new rule" under Teague.

Our analysis of the Teague issue does not, however, end with our conclusion that Grady announced a new rule. Despite the general bar on retroactive application of new rules for cases on collateral review, new rules under Teague are fully retroactive if they fit into one of two exceptions. Teague, 490 U.S. at 311.

Teague stated that a habeas petitioner may rely on a new rule: 1) "if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'"; or 2) "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" Id. As a double jeopardy rule does not concern the fairness of the procedures used to convict, the second exception is not applicable here.

The first exception, narrowly defined in Teague, was expanded in Penry v. Lynaugh, 492 U.S. 302 (1989), a case addressing the constitutionality of imposing the death penalty on mentally retarded defendants. Although Teague described the first exception as "focusing solely on new rules according constitutional protection to an actor's primary conduct," id. at 329, Penry suggested that the first exception also encompasses "substantive categorical guarantees accorded by the Constitution, regardless of the procedures followed." Id. Deciding that a new rule prohibiting the execution of mentally retarded defendants would fit within the first Teague exception, the Court explained:

> "[A] new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all. In both cases, the Constitution

> itself deprives the State of the power to impose a certain penalty, and the finality and comity concerns underlying Justice Harlan's view of retroactivity [expressed in Mackey v. United States, 401 U.S. 667 (1971)] have little force."

492 U.S. at 330. The Penry Court added: "'There is little societal interest in permitting the criminal process to rest at a point where it ought properly never to repose.'" Id. (citing Mackey, 401 U.S. at 693 (Harlan, J., concurring in part and dissenting in part)). Thus, the first Teague exception "cover[s] not only rules forbidding criminal punishment of certain kinds of primary conduct, but also rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." 429 U.S. at 330.

In Butler v. McKellar, 110 S. Ct. 1212 (1990), and Saffle v. Parks, 110 S. Ct. 1257 (1990), the Court described the

first Teague exception as encompassing "'categorical guarantees accorded by the Constitution' such as a prohibition on the imposition of a particular punishment on a certain class of offenders.'" Butler, 110 S. Ct. at 1218 (emphasis added). See also Saffle, 110 S. Ct. at 1263 (same). Thus, the Court cited the rule discussed in Penry as an illustrative example of a categorical constitutional guarantee, but did not use that rule to limit the scope of the exception.

The Fifth Amendment states that "[n]o person shall. . . be subject for the same offence to be twice put in jeopardy of life or limb. . . ." In North Carolina v. Pearce, 395 U.S. 711 (1969), the Court labeled the double jeopardy clause a "basic constitutional guarantee," id. at 718, and quoted an 1873 case that stated: "'If there is anything settled in the jurisprudence of England

and America, it is that no man can be twice lawfully punished for the same offense. And . . . there has never been any doubt of [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court on the same facts, for the same statutory offense.'" Id. at 717-718 (quoting Ex Parte Lange, 18 Wall. 163, 168 (U.S. 1873)).

The protection afforded by the double jeopardy clause operates at an elemental level. The purpose of the clause is not to ensure the fairness of the trial, but to prevent the trial from taking place at all. See Robinson v. Neil, 409 U.S. 505, 509 (1973). Because it bars an unconstitutional prosecution, a rule concerning double jeopardy is analogous to the rule discussed in Penry, which would have barred the imposition of an unconstitutional punishment. See

Penry, 492 U.S. at 329-30. It thus follows that the prohibition on double jeopardy is a "categorical guarantee[] accorded by the Constitution." See Butler, 110 S. Ct. at 1218. We therefore conclude that a rule concerning double jeopardy, such as the Grady rule, falls under the first Teague exception and must be accorded full retroactive effect.

Our conclusion finds further support in the pre-Teague opinion of Robinson v. Neil, in which the Court accorded full retroactive effect to the double jeopardy rule it had earlier announced in Waller v. Florida, 397 U.S. 387 (1970). In Robinson, the Court refused to apply the prevailing standard, as prescribed in Linkletter v. Walker, 381 U.S. 618 (1965), for determining the retroactivity of constitutional rules. It stated that a rule concerning double jeopardy did not "readily lend[] itself" to a Linkletter

analysis. Robinson, 409 U.S. at 507. The Court reasoned that while the double jeopardy guarantee, like other constitutional guarantees, is a right of the criminal defendant, "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." Id. at 509.

Although Robinson has been superseded by Teague, we believe that the Robinson Court's observation about the nature of the double jeopardy guarantee retains its force and is relevant to the issue before us. Because the double jeopardy clause prevents an unconstitutional trial from taking place, it deprives the court of jurisdiction. Historically, federal habeas review has existed to permit convicted prisoners to challenge the jurisdiction of the trial court. See 3 W.

LaFave & J. Israel, Criminal Procedure § 27.3(a) (1984).

We therefore hold that although Grady announced a new rule, that rule is nonetheless available to petitioners challenging their convictions on collateral review.

III.

We now address the merits of McIntyre's double jeopardy claim. McIntyre argues that he is entitled to relief under Grady because his conviction for stealing relied on proof of conduct for which he had already been prosecuted. The State counters that McIntyre's double jeopardy rights were not violated because the tampering prosecution concerned conduct that occurred on the day that he was caught operating the car, while his stealing trial concerned conduct that occurred on the day he stole the car.

There is no dispute that Grady provides the relevant standard. The Supreme Court intended Grady "to guide double jeopardy analysis in all cases involving successive prosecutions." United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990), petition for cert. filed, No. 90-1527 (Apr. 3, 1991). See also United States v. Easley, 927 F.2d 1442, 1451 (8th Cir. 1991).

Once a subsequent prosecution survives the Blockburger test, the court must next analyze if "the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Grady, 110 S. Ct. at 2093. In Grady, the Court held that this rule barred the subsequent prosecution of a motorist for criminally negligent homicide and assault after he had earlier

pled guilty to driving while intoxicated and failing to keep to the right of the median in connection with the same collision. Id. at 2094. The Court stated:

> By its own pleadings, the State has admitted that it will prove the entirety of the conduct for which Corbin was convicted -- driving while intoxicated and failing to keep to the right of the median -- to establish essential elements of the homicide and assault offenses. Therefore, the Double Jeopardy Clause bars this successive prosecution. . . .

Id.

The Court added, however, that its holding would not bar a subsequent prosecution on the homicide and assault charges if the State relied solely on conduct, such as driving too fast in a heavy rain, for which Corbin had not already been convicted. Id. The Court clarified its holding by stating that the presentation of specific evidence in one trial would not "forever prevent the government from

introducing that same evidence in a subsequent proceeding." Id. at 2093. It explained: "The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct." Id.

Under Grady, we must answer two questions: 1) Is the conduct the indictment requires to be proven conduct that constitutes an offense for which the defendant has previously been prosecuted? and 2) Is it being proven to establish an essential element of the offense for which the defendant is now being prosecuted? See United States v. Felix, 926 F.2d 1522, 1532 (10th Cir. 1991) (Anderson, J., dissenting), petition for cert. filed, No. 90-1599 (Apr. 15, 1991).

In McIntyre's first trial, for tampering, the government presented the testimony of the two police officers who arrested McIntyre. They testified how

they spotted the stolen Galant, pursued the vehicle and stopped it, and apprehended the driver, who turned out to be McIntyre. One of the officers testified that Mitsubishi keys were found in the ignition.

Jake Naughton, manager of the Mitsubishi dealership, testified that he had observed McIntyre speaking to salesman George on the day the car was stolen, that he saw George and McIntyre leave together to go on a test drive, and that the keys returned to the key board did not belong to the demonstrator Galant. Naughton also testified that McIntyre's use of the car on the day of the arrest was without permission. In his testimony, George identified McIntyre as the man he had observed looking at the showroom Galant and whom he later accompanied on a test drive of the demonstrator car. George also testified that McIntyre,

after the drive, returned a set of Mitsubishi keys that were later discovered to be the keys to the showroom Galant. George also testified that he had examined the keys found in the car when McIntyre was apprehended, and that one of those keys belonged to the stolen car.

At the second trial, for stealing, the government presented essentially the same evidence. Again, Naughton and George testified as to the events that transpired at the dealership on November 22, 1985. One of the two arresting officers testified again, describing how he and his partner had observed the stolen car, pursued and stopped it, and apprehended McIntyre. The officer also testified that he saw keys in the ignition. The government also presented the testimony of a detective who had not testified at the first trial and who described the

photographic lineup in which George had identified McIntyre.

Applying the Grady test to the facts before us, we focus on the conduct the government proved, not the evidence it used to prove that conduct. See Grady, 110 S. Ct. at 2093.

In the first trial, the government proved first degree tampering by establishing that McIntyre was apprehended while operating the car, that McIntyre lacked the dealership's consent to operate the car, and that he operated the car knowing that he lacked the consent.[4]

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[4]The Court charged the jury in the tampering case as follows:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> > First, that on November 24, 1985, . . . the defendant knowingly operated a certain automobile, a 1986 Mitsubishi Ga-

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While the testimony about the events at the car dealership did not directly concern McIntyre's operation of the car, it was relevant to the owner's lack of consent and McIntyre's knowledge that he lacked consent.

At the stealing trial, the government proved the same conduct that it had proved to establish the entirety of the tampering offense. Thus, the answer to the first inquiry under Grady -- whether the conduct being proven is conduct that

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(Footnote Continued)
lant, owned by Kirkwood Mitsubishi; and

Second, that he operated the automobile without the consent of the owner, and

Third, that he operated knowing that he did so without the consent of the owner, then you will find the defendant guilty of tampering in the first degree. . . .

constitutes a previously prosecuted offense -- must be "yes".

The second step in our analysis focuses on whether the conduct was proved to "establish an essential element" in the second prosecution. The elements of stealing, as stated in the charge to the jury, are:

> If you find and believe from the evidence beyond a reasonable doubt:
>
> First . . . the defendant took a 1986 Mitsubishi automobile, property owned by Kirkwood Mitsubishi, and
>
> Second, the defendant did so without the consent of Kirkwood Mitsubishi, and
>
> Third, that defendant did so for the purpose of withholding it from the owner permanently, and
>
> Fourth, that the property taken was an automobile,
>
> then you will find the defendant guilty of felony stealing.

The conduct constituting the tampering offense was proved in the second

trial to establish essential elements of the stealing charge. The testimony regarding the visit to the car dealership, together with the testimony concerning McIntyre's operation of the car, proved the entirety of the tampering offense, and nearly the entirety of the stealing offense. The only new witness presented by the government at the stealing trial was Detective Schneedle, who testified regarding the photographic lineup and George's identification of McIntyre. Even accepting that this testimony was necessary to help establish the first element of the stealing charge, the conduct proved at the first trial established the whole of the next two elements -- the owner's lack of consent and McIntyre's purpose of withholding the car permanently from the owner.

Therefore, we conclude that McIntyre's second prosecution violated

the rule of Grady because the government, to establish essential elements of the stealing charge, proved conduct that constituted an offense for which McIntyre had already been prosecuted. See Grady, 110 S. Ct. 2093.

The State tries to distinguish from Grady by arguing that McIntyre was convicted of tampering based on the events that occurred on November 24, 1985, and that he was convicted of stealing based on events that occurred on November 22, 1985.

We are not persuaded by this argument. At both trials, the government proved McIntyre's conduct on both dates to establish the various elements of both tampering and stealing. We also note the Court's admonition in Brown v. Ohio, 432 U.S. 161, 169 (1977): "The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its

limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." See also United States v. Pungitore, 910 F.2d 1084, 1110-11 (3d Cir. 1990) (discussing the auto stealing and joyriding prosecutions at issue in Brown as constituting a single course of conduct and distinguishing that case from those involving a continuous criminal enterprise), cert. denied, 111 S.Ct. 2010 (1991).

We therefore hold that the government's prosecution of McIntyre for stealing violated the Fifth Amendment's guarantee against double jeopardy. For the foregoing reasons, we reverse the judgment of the district court, and remand with instructions to grant the writ of habeas corpus.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

| | | |
|---|---|---|
| TERRY D. McINTYRE, | ) | |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| v. | ) | No. 88-1708 C (2) |
| | ) | |
| MYRNA TRICKEY, and | ) | |
| WILLIAM L. WEBSTER, | ) | |
| Attorney General, | ) | |
| State of Missouri,[1] | ) | |
| | ) | |
| Defendant. | ) | |

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE

This cause is before the Court on the petition of Missouri state prisoner Terry D. McIntyre for a writ of habeas corpus under 28 U.S.C. §2254. This matter was referred to the undersigned United States Magistrate for review and a

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[1]Because petitioner is challenging a sentence to be served in the future, William L. Webster, Attorney General for the State of Missouri, is a proper party respondent. 28 U.S.C. §2254, Rule 2(b). Myrna Trickey is a proper, but nominal, party respondent. Id.

recommended disposition. 28 U.S.C. §636(b).

In 1987, petitioner Terry D. McIntyre was convicted of first-degree tampering and stealing a motor vehicle by the Circuit Courts of the City of St. Louis and St. Louis County, respectively. He was sentenced to two ten-year terms of imprisonment, said sentences to run consecutively. Petitioner is presently incarcerated at the Missouri Eastern Correctional Center in Pacific, Missouri. Petitioner is herein challenging only his conviction and sentence for stealing a motor vehicle from the Circuit Court of St. Louis County; he does not challenge his first-degree tampering conviction from the Circuit Court of the City of St. Louis in the instant action. Petitioner's conviction and sentence from the Circuit Court of St. Louis County were affirmed on direct appeal. State of

Missouri v. McIntyre, 749 S.W.2d 420 (Mo.App. 1988). (Resp. Exh. E.)

On September 2, 1988, petitioner filed the instant petition for a writ of habeas corpus. He asserts one ground for relief: his conviction for stealing a motor vehicle violates his Fifth Amendment right against double jeopardy. Specifically, petitioner argues that the evidence used against him in the prosecution of the tampering charge was also utilized to gain a conviction in the stealing charge. Petitioner contends that the tampering and stealing a motor vehicle offense constitute the same offense.

In the direct appeal of his conviction for stealing a motor vehicle, petitioner raised the instant ground for federal habeas relief amongst several others. (Resp. Exh. C, at 4-5). Respondent concedes that this ground is

exhausted. (Response to Order to Show Cause, at 3-4.) Therefore, this ground may be addressed on the merits by this Court. Purnell v. Missouri Department of Corrections, 753 F.2d 703, 708 (8th Cir. 1985).

Petitioner relies upon Brown v. Ohio, 432 U.S. 161 (1977) to support his argument that his right against double jeopardy was violated. In Brown, the defendant was arrested for "joy riding," pled guilty, and served a short jail sentence. Id., at 162-64. Upon his release, he was charged with automobile theft of the same vehicle. Under Ohio law the misdemeanor of "joy riding" was included in the felony of automobile theft. Id. The Supreme Court reversed the conviction on double jeopardy grounds even though the acts of theft and "joy-riding" occurred on different dates. Id., at 168-170.

Although petitioner argues that the facts of his case are identical to the facts of Brown, the undersigned concludes that they are not identical. Under Missouri law, tampering with a motor vehicle is not a lesser-included offense of stealing the same vehicle. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422; State of Missouri v. Smith, 655 S.W.2d 626, 627-28 (Mo. App. 1983); State of Missouri v. Rivers, 663 S.W.2d 255, 256 (Mo. App. 1983); State of Missouri v. Gobble, 675 S.W.2d 944, 948-49 (Mo. App. 1984); State of Missouri v. Souders, 703 S.W.2d 909, 911 (Mo. App. 1985). Furthermore, the Missouri Court of Appeals found that "the tampering was not a part of the stealing that had occurred two days earlier" for which petitioner was subsequently convicted and sentenced in the Circuit Court of the City of St.

Louis. State of Missouri v. McIntyre, supra, 749 S.W.2d at 422.

This Court cannot reinterpret Missouri statutes after a finding of state law made by a state appellate court. Wilkerson v. Wyrick, 806 F.2d 161, 164 (8th Cir. 1986); Harkins v. Wyrick, 589 F.2d 387, 391 (8th Cir. 1979) Because tampering is not a lesser-included offense of stealing a motor vehicle under Missouri law, the undersigned concludes that there is no violation of petitioner's right against double jeopardy.

RECOMMENDATION

For the reasons set forth above, it is the recommendation of the undersigned United States Magistrate that the petition of Terry D. McIntyre for a writ of habeas corpus be denied without further proceedings. The parties are advised that they have eleven (11) days to file written objections to this Report and Recommendations.

--David D. Noce---------
UNITED STATES MAGISTRATE

Signed this 2nd day of November, 1988.